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Nos. 88-5014 and 88-5158

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOSE GOMEZ,

Petitioner,

v.

UNITED STATES,

Respondent.

DIEGO CHAVEZ-TESINA,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI (GOMEZ) FILED JULY 5, 1988
PETITION FOR CERTIORARI (CHAVEZ-TESINA) FILED JULY 22, 1988
CERTIORARI GRANTED JANUARY 9, 1989

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RELEVANT DOCKET ENTRIES IN *UNITED STATES v. GARCIA, DIEGO CHAVEZ-TESINA, JOSE GOMEZ, et al.*

District Court Proceedings

(Docket No. 86 Cr. 266(S) (JMM))

3/27/86	Magistrate complaint filed and arrest warrant issued and executed.
3/28/86	Defendants arraigned on complaint before Magistrate.
4/11/86	Indictment handed up and filed.
4/22/86	Defendants arraigned on the indictment.
7/ 7/86	Superseding indictment handed up and filed.
7/ 8/86	Defendants arraigned on superseding indictment.
11/20/86	Pre-Trial Conference before District Judge McLaughlin. Jury selection scheduled before a magistrate.
2/ 9/87	Jury selection held before Magistrate Chrein.
2/17/87	Jurors sworn and trial before District Judge McLaughlin begins.
2/28/87	Trial ends with jury verdict of guilty.
5/14/87	Judgment of Conviction and sentence entered.
5/14/87	Notices of Appeal filed.

Court of Appeals Proceedings

(Docket No. 87-1243-1246, 1264)

10/19/87	Oral argument of *United States v. Garcia, et al.*
6/ 1/88	Convictions affirmed.
8/ 4/88	Petition for rehearing denied.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Plaintiff,

-against-

WILLIAM SALAZAR, *et al.*,
Defendant.

TRANSCRIPT OF JURY SELECTION
BEFORE THE
HONORABLE MAGISTRATE A. SIMON CHREIN
UNITED STATES DISTRICT JUDGE

February 9, 1987
10:00 A.M.

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[2] THE COURT: Are we all here now?
MR. O'SHEA: Yes.
THE COURT: All right, come up, come up, please. Just make yourselves comfortable in the chairs here.
All right, Mr. Batchelder, who do you represent?
MR. BATCHELDER: I represent William Salazar.
THE COURT: Okay. Mr. Salazar.
Let me just see. Okay. William Salazar.
All right, who do you represent, Mr. Levine?
MR. LEVINE: Dacina.
THE COURT: Diego Chavez Dacina.
MR. LEVINE: Right.
THE COURT: Who is Mr. Miller?
MR. MILLER: Frederick V. Miller.
I represent Marva Vallejo.

THE COURT: All right. I have the indictment in front of me.
All right, Mr. Wauberg, who do you represent?
MR. WAUBERG: Jose Gomez.
THE COURT: Jose Gomez.
And finally, Mr. Nisonoff, who do you represent?
MR. NISONOFF: Hugo Shanks Carera.
THE COURT: All right. I notice that a number of these two defendants appear to be charged with a RICO count. A number appear to be charged with a conspiracy count and the [3] balance in very substantive counts regarding cocaine; is that correct?
MR. O'SHEA: That's correct, Judge.
THE COURT: Okay. What I plan to do, obviously, the jury will be selected in Judge McLaughlin's courtroom. I want to go over the ground rules here.
The jurors are, of course, have to be told the nature of the charge.
I don't know if it would be helpful. Of course, I'll give the usual explanation concerning the fact that I know the indictment is not evidence and that no inference can be drawn against the defendant just because he is accused of a crime of indictment but rather than identify each defendant as the counts at this point, though I will go into my questioning of the jurors, their obligations.
Okay. What I was going to say is that I will, of course, question the jurors on their ability to give each defendant a separate trial that he or she is entitled to in the sense that I will tell them that some defendants are accused of some crimes with others, with other crimes, they will have the obligation if they find that one juror, one defendant may have been proven guilty of one crime, they still have the obligation not to sweep everybody along with the tide. But I thought it might be helpful if I just indicated that certain defendants are charged with the crime of engaging in the [4] enterprise that carried on a pattern of racketeering activity.

These are the words I will use and I will indicate that Judge McLaughlin will explain to them in the charge in greater length, some of the defendants are engaged in the pattern of racketeering activity and that they participated or conducted an enterprise whose goal it was to distribute narcotics. Cocaine, specifically.

I'll indicate that the other defendants are accused of other facts, similarly accused of forming a criminal conspiracy. That is an agreement between two or more people to commit, to commit an unlawful act relating to the possession and distribution of cocaine.

I'll indicate that each of the defendants are charged with the possession, or possession with intent to distribute cocaine.

Does anybody object to that overall summary?

MR. NISONOFF: Not that I am objecting.

May I ask you a question, Judge.

Is it your intention not to identify who was indicted on the RICO counts?

THE COURT: If you want I'll identify the RICO conspiracy counts, but I don't want to read each count. I don't see how it adds anything into the picking of the jury. The jury is to determine which jurors would be prejudiced, constitute the existence of a narcotic charge and as long [5] as the jury knows the nature of the charge they will have to address it and it doesn't really matter how much charges they have to address.

I'll indicate a number of charges.

MR. NISONOFF: I'm a little concerned. My client is not accused of the RICO charges.

THE COURT: All right. Let's do it this way, Mr. Salazar.

MR. BATCHELDER: A RICO conspiracy to RICO, I think another conspiracy and two substantive counts.

THE COURT: RICO conspiracy. I'm going just to, if after, say conspiracy.

MR. BATCHELER: I would appreciate that.

THE COURT: And substantive counts.

MR. BATCHELDER: Could you explain to the jury what substantive counts are?

THE COURT: I will not. The substantive. I'm saying he is charged with a number of counts in evidence of guilt, possession of cocaine and possessing with the intent to distribute cocaine.

Are there distribution counts?

MR. O'SHEA: Yes.

MR. BATCHELDER: Two.

THE COURT: Okay. Mr. Dacina is charged with what?

MR. LEVINE: RICO conspiracy and substantive counts.

[6] THE COURT: Is there anyone who is charged with only one substantive count?

MR. MILLER: Mine.

MR. O'SHEA: I think that's right with Gomez, your Honor, charged conspiracy count, one substantive count, the possession.

Shanks is charged with conspiracy and substantive counts.

THE COURT: All right.

Vallejo is charged with what?

MR. MILLER: Conspiracy count, that's all.

MR. O'SHEA: Subsantive count.

MR. MILLER: A substantive count. Thats it.

THE COURT: Then that leaves me with Carera, conspiracy and substantive.

The only one charged with RICO is Salazar, Dacina. You have a conspiracy and substantive?

MR. NISONOFF: Yes.

THE COURT: Do you gentlemen prefer a struck jury or to use a series of rounds?

MR. O'SHEA: Struck.

THE COURT: Let me do this. Does anybody have any questions as to what a struck jury is.

Mr. Levine, just pay attention to me.

MR. LEVINE: I'm sorry, Judge.

[7] THE COURT: Anybody have any questions as to what struck system we use?

MR. BATCHELDER: I do, sir.

THE COURT: Let me just tell you what I plan to do.

Allowing for the fact five of you, with divergent issues, I am going to allow the defendants, collectively, fourteen challenges. Those fourteen can be, if I use a struck jury, will allow you to get prime jurors and alternates.

I'm going to allow the government seven challenges between regular jurors and alternates. How you divide among yourselves the fourteen challenges I discussed is entirely between yourselves.

I do feel that my giving you three more challenges than you would normally have collectively and restrict the government to seven, the six for regular jury, the one for the alternates I have compensated for any possible conflict that there might be between you.

In connection with the jury selection what I will do, therefore, in empanelling 36 jurors in order. I will have three alternates, because I understand the trial will go at least a week, I will have a minimum. It doesn't start for a week.

I understand that, hopefully, they will all rest and be ready to contend with you gentlemen.

I will have 36 jurors seated in order. I will conduct [8] the voir dire as to each juror. Before any preemptory challenge shall be exercised if any juror, and in time inputations, I suspect there might be some time jurors will be excused for cause. If any jurors are excused for cause. I will immediately put another juror in the place of that juror who has been excused for cause before you have to consider your preemptory challenges, so that you will have an array of 36 jurors after voir dire from whom to exercise the preemptory challenges.

The preemptory challenges will be exercised in one submission, but I will alternate in that in the first six

rounds the defendants will have two challenges, they will be rounds, though there will be no intervening of questioning of the jurors on the first six rounds the government will have one challenge each will in fact each of the seven rounds that I will use the government will have one challenge.

The defendants, too. They will alternate, you will alternate as to exercising the challenges first if after all the challenges are exercised we should have fifteen survivors they will sit as jurors in the order in which they survived as the 13th, 14, 15th person will be your alternates. You're free to exercise the challenges from any place within the array during any one of the seven rounds.

In other words, you are not in the 7th round, you are not confined to the highest number of prospective jurors.

For example, perhaps I'm belaboring the obvious in [9] this process, number one, two, three and four and 5 are challenged the jurors who are called first, third, fourth or fifth are challenged, the first juror will be Juror No. 1, too, and Juror No. 2 will be Juror No. 6. This way you have the advantage of knowing who you get if you exercise the challenge.

I will ask all the questions, I will, because it is a narcotic case and one of the questions that I inevitably ask in a narcotic case is whether any juror has had any experience either through his family or directly with narcotics. And I guess, surprisingly a large number of jurors who have relatives who overdosed or cousins who has a problem, I will indicate to those jurors who has to tell me I'll put the question in a way it won't embarrass any jurors. I'll talk in terms of jurors or any close relatives. No juror has to raise his hand, thereby identifying himself publicly who, himself, or herself, has a problem, or has a child with a problem I'll say, a close relative, I will meet with them in Judge McLaughlin's jury room with counsel.

I will question those jurors in a way that obviously they won't be ashamed to discuss this matter by the other prospective jurors, thereby minimizing embarrassment, and hopefully maximizing candor. And even in those sections I will be the only one who is to address any questions to a juror.

[10] What I will do is, after I meet my voir dire of all the jurors, I will meet with you, and I prefer to have my side bars in the jury room so that we don't have to worry about stage whispers being overheard.

Exercising challenges in a way indicate to a juror who was waiving a challenge, things of that sort. I will meet with you in the jury room briefly. You will then tell me if I omitted any questions, if there is any follow-up based upon the responses of any jurors you would like me to engage in.

Then I will go out and ask any questions appropriate.

I will hear any colloquy discussions on challenges for cause in Judge McLaughlin's jury room.

I intend to cover the areas, I intend to cover on the voir dire are obviously prior jury experience, experience or relatives or friends who are engaged in law enforcement. People who know attorneys, people who work for attorneys, people who love everybody, witnesses at a trial, people who have had any close friends or relatives, either who has been a friend or who had contact with narcotics, anybody for any reason feels they could not sit fairly on the case that involves cocaine and anybody who has ever been the victim of a crime.

I will ask each defendant what they do for a living, what their household members do for a living. If they have any children in school. I will ask if they have gone to public school, parochial school, private schools, because some of you [11] may be concerned with the possibility that certain schools may not have drug problems and, oh, my god, and let me ask you now, is there any additional area that you wish me to cover?

MR. NISONOFF: Your Honor, your Honor indicated he was going to ask whether some of the jurors have jury experience, I would ask you to include in that, grand jury.

THE COURT: I was going to.

MR. NISONOFF: The second thing.

THE COURT: This is just areas. This doesn't mean I'm asking only six questions.

MR. NISONOFF: I understood what your Honor said, that the questions, whether they know members of the U.S. Attorney's Office, law enforcement officials, are you asking for the government to give you a witness list and ask the jurors if they know those witnesses.

THE COURT: I was going to do that. I want to minimize the possibility that somebody might be familiar with the witnesses.

Are abt if these people not citizens of the United States?

MR. NISONOFF: Mine is not.

THE COURT: As long as I have one, I'm just going to ask if anyone feels he would be influenced by the fact that a defendant is not a citizen. I'll ask him to bear in mind, people in this country are entitled to the same consideration [12] anybody feels he would have any difficulty applying that, he'll please let me know.

Do you have a problem with that, Mr. O'Shea?

MR. O'SHEA: Normally, I would think it's a valid discovery request, nothing more than that and the government's not required to turn over an exhibit list since all of our testimony in this case is coming through agents. I have no problem formally; I would.

THE COURT: Okay.

Normally, I normally solicit a witness list, namely because I want to balance in my own mind that the trial, the imminent, which favors the guessing of a witness list, is less opportunity to have an improper approach to a witness and each of the trial this is very long it states it's almost a week, I have also have to consider there is a possible juror may know a witness.

If all your witnesses are agents, of course, I am going to be asking if anyone is affiliated with law enforcement work.

MR. O'SHEA: Yes. The other thing, Judge, in this case the Title 3 intersects consensual phone calls, all of those recordings are in Spanish and I think it would be appropriate to find out if anyone is Spanish speakers on the jury so we don't have Spanish speakers acting as mini experts and take the evidence as it comes in terms of translation and [13] and the court's instruction.

THE COURT: That's going to be difficult. I can ask all the right questions and get all the right answers, if some jurors know Spanish better at interpreting he's still going to tell his friends, I will tell them by the way of a question that we don't want to have experts on the jury, all jurors are to rely on their experience in life and their common sense.

The fact that different people perceive different events differently, the reason we have 12 jurors, not one juror deciding the case.

You cannot decide the case on the basis of other than what you have learned in the court, either through the instructions and interpretation of evidence, and I'll ask each one, especially when I deal with a Spanish question I'll say, "Can you follow that general rule of law?"

Yes, Mr. Nisonoff.

MR. NISONOFF: I object. The jurors' function is to find facts, and if the juror understands Spanish, if he can understand the wording on the tape, all he's doing is finding fact.

THE COURT: Mr. Nisonoff, my answer to you is that, I took three years of Spanish in high school and being a magistrate I have a very modest ego, if I had more developed ego I might decide I use, I have a more better understanding than the interpreter and for that reason I don't have a certified [14] interpreter that has been qualified, except for the natural tendency for a

juror to be precious when they're with their peers I would let the other jurors know that the interpreter is the alternate source of the direct link with the continuing concern.

MR. WAUBERG: What about excusing un-Hispanic-speaking people?

THE COURT: I'm not going to do that.

If you feel you want to keep Spanish-speaking people off of the jury that is why God and Magistrates grant preemptory challenges.

MR. WAUBERG: I have another one, since all witnesses are government's agents.

THE COURT: Yes, I'm sorry, Mr. Wauberg.

MR. WAUBERG: Would you ask them whether they would give more credence?

THE COURT: That's part of the normal question. I instruct them, no one is entitled to greater weight because of occupation they hold. If there are any finishing touches, questions you have, why don't you wait till I cover my voir dire.

Now, the next question is, I have no right, nor will I attempt to ask the defendants to identify any witnesses now because of the fact, not having heard the government's case, you're under no obligation to predict you'll call witnesses.

Bear in mind, if somebody recognizes your witness [15] you may have disqualified a juror it may well be a juror who you might want to keep on the jury. You might not like the alternates; number 1, alternate No. 2, as the case might be. What I will do, when I come upstairs you will hand Mrs. Kollman a piece of paper, Mr. O'Shea will hand the government list on them to the extent they wish to identify their witnesses, I will not identify to the jurors which side will call which witness.

So, you don't have to concern yourself with the fact you might have an introductory case. This appearance you are not producing much.

If you want to hand up a witness list, feel free to hand it up to Miss Kollman.

Finally, who is your case agent?

MR. O'SHEA: Preston Grubbs.

THE COURT: G-R-U-B-B-S?

MR. O'SHEA: Right.

THE COURT: If there is some question as to whether there is or is not, he is intended to ask the defendant, before the jurors are brought in, whether they have any objection to a Magistrate selecting a jury, I will explain to them. I want to explain to them, they have a right to a trial before a district judge and judge of higher rank than myself. They will have a trial before a District Judge. I'm participating in the trial solely to the extent of selecting a jury.

[16] Please, prepare them for this question. If anybody has an objection, then we'll deal with it or Judge McLaughlin, hopefully, will deal with it.

Is there anything else?

MR. WAUBERG: Yes, your Honor. On several days, I guess the week of 5/16, Mr. Fabricant will substitute for me. You might ask if they know him.

Also, I have to leave here at three o'clock to go to St. Louis for a Federal Court proceeding.

THE COURT: Hopefully we'll, I'll doubt we'll be finished.

Is there anything else we can do for anybody?

MR. O'SHEA: I don't think so, Judge.

THE COURT: Do me a favor. Go without passing. to Judge McLaughlin's courtroom. He would be faster, we are all there faster, we can get going faster and we can send Mr. Wauberg to St. Louis.

(Proceeding concluded)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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86 CR 266

UNITED STATES OF AMERICA,
Plaintiff,

-against-

JOSE GOMEZ, *et al.*,
Defendants.

JURY SELECTION BEFORE A. SIMON CHREIN, CHIEF MAGISTRATE

February 9, 1987

[2] THE COURT: Ready to start, gentlemen?

MR. O'SHEA: We are missing a chair.

THE COURT: Take a chair from another table. Is that a major logistical problem? Let me swear the interpreters. Are both interpreters here?

R. VAN NORMAN WHITFORD and JOSE A. MONTALDO, were duly sworn as interpreters by the Court.

THE COURT: Gentlemen, I understand that when the question was posed to some or all of the defendants as to whether or not they wished to consent to a Magistrate selecting the jury, with the understanding that the case would nonetheless be tried by an Article 3 Judge, that some defendants have objected to the procedure of a Magistrate jury selection. Is that correct?

MR. WARBURGH: That is my understanding, yes.

THE COURT: Do all of the defendants object, or just some?

MR. LEVINE: On behalf of my client, he objects to the jury selection before the Magistrate.

MR. BATCHELDER: On behalf of Mr. Salazar, Mr. Salazar objects, Your Honor.

THE COURT: Do any other defendants object to a Magistrate selecting the jury?

MR. WARBURGH: I need an interpreter. Mr. Gomez objects.

[3] THE COURT: That leaves me with just two additional—

MR. MILLER: Let's have a severance and we will try our own case.

THE COURT: I am not talking about a severance. Mr. Salazar has objected, is that correct, Mr. Batchelder?

MR. BATCHELDER: That is correct, sir.

THE COURT: Mr. Levine, Mr. Tesina has objected?

MR. LEVINE: I did that originally, Judge.

MR. MILLER: No objection.

THE COURT: Mr. Warburgh, your client has objected?

MR. WARBURGH: Mr. Gomez objected.

THE COURT: Mr. Nisinoff?

MR. NISINOFF: He has not objected, Your Honor.

THE COURT: Mr. O'Shea, what is the government's view as to whether we can proceed?

MR. O'SHEA: Your Honor, I believe the view that you espoused earlier in your own courtroom, that the selection of the jury by yourself, the Magistrate, is perfectly proper. The government's position is that we should proceed with the jury selection.

THE COURT: I intend to proceed with the selection. In the event Judge McLaughlin decides that he [4] would prefer to select the jury, either on his own initiative or at the request of any counsel, inasmuch as no juror will be sworn as a trial juror, they will, of course be sworn for the voir dire, there would be no jeopardy. There would be no prejudice and Judge McLaughlin would be free to discharge whatever jury we select today.

My own view of the matter is that the selection of the jury, even over the objection, or without the consent of the defendants has been approved in other matters within this Circuit.

Yes, Mr. Batchelder?

MR. BATCHELDER: Do I understand it that the Second Circuit has passed on the propriety of Magistrates over the objection, or whether—

THE COURT: No, they have approved the procedure, my understanding is.

MR. BATCHELDER: They have not, as I understand it, approved the procedure if the defendant wishes to, because the Magistrate Act has been construed narrowly not to confer that power, as I understand it.

THE COURT: Mr. Batchelder, what I have indicated I will do, unless both sides object, is to proceed to select the Jury and you can raise whatever objection to the panel selected and to the manner of its selection before Judge McLaughlin on the 17th when the trial begins. [5] If Judge McLaughlin or in fact I would ask that you bring it to Judge McLaughlin's attention at the close of this selection process. If he chooses to select the jury by himself, then he is free to do so.

MR. BATCHELDER: Your Honor, I don't—

THE COURT: You have your exception.

MR. BATCHELDER: I realize I am as anxious as Your Honor to bring this matter to a conclusion, but in defense of my client's interests, Your Honor, I think it would be a brave person, Judge McLaughlin included, who after having wasted three, four hours of what we are doing here, to automatically say, no, I don't think Magistrate Chrein has the power, so therefore, we are going to go ahead.

I am submitting if my client objects to jurisdiction, as I understand the Magistrate Act, unless my client consents, and you do not have jurisdiction to do what we are about to embark on, and that is all the record I am making.

THE COURT: Does anybody feel that some inquiry should be posed to Judge McLaughlin now?

MR. MILLER: Judge

THE COURT: I see no need for such an inquiry. I believe the matter has been dealt with. I don't think there was a specific central issue to any case, but jury selections by Magistrates have been approved in both this [6] Circuit and other Circuits. I unfortunately do not have the cases at my fingertips at this point.

MR. O'SHEA: I don't have the cases either, Your Honor. But I believe you are correct. I have no objection, however, if the Court wishes to inquire of Judge McLaughlin that he would like to do at this point. It is entirely up to the Court.

THE COURT: Mrs. Culman, can you get me Judge McLaughlin's law clerk on the phone?

THE CLERK: Yes, sir.

THE COURT: In fact, I am going into chambers and deal with it myself. Are they getting somebody? I will speak to him. They are coming in. Yes, Mr. Warburgh?

MR. WARBURGH: We have one interpreter in the Courtroom.

THE COURT: There is a machine.

MR. WARBURGH: Yes, I understand. There came a time here when I needed an interpreter to speak to my client briefly, privately, and he had to stop doing what he was doing to come over and aid me. I don't think it is important now during jury selection process.

THE COURT: Then I will make a note of that and we will tell the Judge. You can raise that with Eileen Levine before the trial. All right, I am going to proceed to select the Jury. Judge McLaughlin's view of the law was [7] the same as mine. Those parties that object, and we have recorded on the record who has objected and who has consented, that those parties who object are deemed to have an objection. I assume the ground is that jury selection being part of the trial, and a Magistrate not being permitted even with waiver to try a felony case, that this is a part of the trial and the parties insist that all aspects of the trial or those objecting parties insist that all aspects of the trial be conducted by an Article 3 Judge, your exception is noted and when the jury comes up we will proceed to pick the jury.

I would ask that any friends or relatives or spectators stay within the first two rows on the right side of the room. I intend to fill the remainder with prospective jurors. So if any of you have, if there are any spectators or people who are not prospective jurors, sit in the first row alone where the three people are seated now.

MR. NISINOFF: Stay right there.

THE COURT: Fill up my right side first. Are those two gentlemen deputy marshals?

A VOICE: Yes, sir.

THE COURT: Could you possibly position yourself over those two benches. I intend to use those benches for prospective jurors. There must be an extra chair or two that you can use. Have you phoned for the jurors yet?

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EXCERPT FROM TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE DISTRICT JUDGE

February 17, 1987

[11] THE COURT: What is Warburgh's position? Was he retained?

MR. AXELROD: He was retained, your Honor, and we did receive some money in the case. I personally don't know what the amount was. I know that a substantial amount was not paid.

However, it does not have anything to do with the fact that we are aware of our obligations and Mr. Warburgh intends to conduct this case judicially and properly.

THE COURT: I don't see any problem, do you?

MR. O'SHEA: I don't, Judge.

THE COURT: And if Mr. Warburgh wants to at some point apply to be appointed, I am perfectly willing to entertain it.

MR. O'SHEA: That sounds reasonable, Judge.

THE COURT: Why don't you tell that to your client.

MR. AXELROD: I don't know if you want me to tell him or if you want to tell it to him.

THE COURT: You tell him.

(Whereupon, the following takes place in open court.)

THE COURT: The final housekeeping matter is the matter of jury selection.

It was brought to my attention that at least one counsel objected in front of Magistrate Chrein to the fact [12] that Magistrate Chrein was picking the jury. I find this remarkable since all of us had agreed a month ago that the magistrate would do it.

It is also my understanding that the magistrate has the power, in any event, regardless of any objection. But in case there is a problem let me now ask if there is any one juror for whom a challenge for cause was not sustained by Magistrate Chrein and would you like to renew the objection?

MR. BATCHELDER: Your Honor, I am that one counsel who elected to raise that issue. I did so, your Honor, based upon a discussion with my client who advised me that he did not wish, despite the—I guess he did not understand what I had previously spoken to him concerning what the effect was.

Your Honor, I know—and I am not raising the issue to this panel—that I can select a certain jury.

Your Honor, the position of my client is as follows:

That he believes that he is entitled to have a judge select the jury.

Your Honor, I have looked at the Magistrate's Act fairly closely. I have also looked at the local rules and the other local rules of other jurisdictions, and I know of no case that indicates that the magistrate does have

the power, and I was unable to find one, and perhaps my research is defective. But as I read the Magistrate's Act what I find is [13] that as a convenience to judges, and I am not adverse to convenience, but this has grown up that the magistrate selects the judges—

MR. NISONOFF: The jurors.

MR. BATCHELDER: Excuse me, the jurors.

I believe if my client wishes to raise this issue that it is a jurisdictional issue, not an issue to a specific juror, but a jurisdictional issue. And I regret, your Honor, that it was brought up at this time. However, I think my client, as it was explained to him outside, did not understand my waiver on his behalf and I apologize to the Court on his behalf.

THE COURT: The Court rules against that issue relying on United States against Ford 797 1329, U.S. against Peacock, 761 F. 2d, 1313 and United States against Rivera-Sola, 715 F. 2d 856, all three of which indicate that so long as there is a de novo rule available by the District Judge there is no problem.

I am now making a de novo rule available to you if there is any juror you want to object to.

MR. BATCHELDER: I cannot point to any specific juror obviously, your Honor. But I would like to ask the Court, are those Second Circuit cases?

MR. BATCHELDER: No, they are not.

MR. BATCHELDER: That's where I was researching.

[14] Thank you, your Honor.

MR. O'SHEA: I would like to note for the record, Judge, the only juror who was challenged for cause was excused with the Government's consent.

THE COURT: Yes. I see the tactic, Mr. O'Shea.

Are we ready to begin?

MR. O'SHEA: Yes, Judge.

THE COURT: If you get the jury.

(Whereupon, at this time there was a pause in the proceedings.)

THE COURT: Gentlemen, we have another juror problem.

Juror number five has a death in the family and must attend a funeral on Thursday. She can, however, sit on Friday.

My inclination would be to accommodate her schedule, that we sit on Friday and let her take off Thursday.

MR. BATCHELDER: Yes, sir.

THE COURT: Or we can excuse her and put in an alternate.

MR. MILLER: We are better off working on Friday and stay off on Thursday and let her go to the funeral.

MR. O'SHEA: I agree.

THE COURT: Everybody agree?

MR. NISONOFF: Yes.

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Nos. 238 to 242, Dockets 87-1243 to 87-1246 and 87-1264

UNITED STATES OF AMERICA,
Appellee,

v.

JOSE DANERY GARCIA, DAMARIS SANCHEZ, WILLIAM SALAZAR, FABIO PORRAS, DIEGO CHAVEZ-TESINA, ADELA GOMEZ, BEIMAR VALLEJO, JOSE GOMEZ, JAIME NEWBOLD, YOLANDA MARTINEZ, HUGO SHANKS-CARRERA,
Defendants,

DIEGO CHAVEZ-TESINA, BEIMAR VALLEJO, JOSE GOMEZ, HUGO SHANKS-CARRERA, WILLIAM SALAZAR,
Defendants-Appellants.

Argued Oct. 19, 1987

Decided June 1, 1988

Before OAKES, CARDAMONE and MAHONEY, Circuit Judges.

CARDAMONE, Circuit Judge:

This appeal requires us to decide at what stage in a criminal prosecution a defendant is entitled to the presence of an Article III judge. Appellants urge that a defendant may claim such a right at the commencement of jury selection. There is no doubt that everything has its season, and there is a time when an accused is en-

titled to the presence of a federal district court judge. But that season does not necessarily come with the commencement of the petit jury selection. In this case, a magistrate presided over the jury selection for the trial of appellants, William Salazar, Diego Chavez-Tesina, Beimar Vallejo, Jose Gomez, and Hugo Shanks-Carrera. They appeal from the May, 1987 judgments of convictions entered against them in the United States District Court for the Eastern District of New York (McLaughlin, J.) for narcotics-related offenses.

FACTS

Appellants' convictions are the result of an undercover investigation into a major cocaine distribution network in New York and New Orleans conducted by the Drug Enforcement Administration (DEA). DEA Special Agent Rene de la Cova cultivated an acquaintance with Jose Danery Garcia, who introduced de la Cova to the defendant Salazar. Salazar and Garcia sold de la Cova two-eighths of a kilogram of cocaine on January 15, 1986. About three weeks later, de la Cova asked Salazar to supply 50 kilograms of cocaine for one of de la Cova's customers. Salazar mentioned that his business partner, a Colombian of Japanese descent who had lived in London would soon be visiting New Orleans to inspect a large shipment of cocaine. This description matched the defendant Chavez-Tesina, a resident of New York. In New Orleans, another DEA agent, Douglas Krockenberger, was engaged in a separate undercover operation and encountered Chavez-Tesina, who told the agent that he had agreed to deliver cocaine to New York. As de la Cova and Salazar finalized their deal, Salazar made telephone calls concerning it to Chavez-Tesina's residence in New York.

While the large transaction was being arranged, Salazar made or facilitated several other sales of cocaine; only three in particular involved the appellants. On February 6, 1986 Salazar sold one-eighth of a kilogram of cocaine to de la Cova. In another transaction, Salazar contacted the defendant Vallejo and said that he had something "very, very good." Salazar telephoned the defendant Gomez two days later, on March 17, 1986, and asked for "two favors," slang for two kilograms of cocaine, which Gomez agreed to provide. Gomez was seen one hour later carrying a large plastic bag into Salazar's house and later leaving without it. Vallejo was then observed leaving Salazar's house with Salazar. The two drove to Vallejo's house and both entered the house with the bag. Soon thereafter, Salazar exited alone, carrying nothing. Four days later, Vallejo made a small delivery of cocaine to de la Cova and Salazar for their "personal use".

The 50 kilogram deal approached execution. After an agent posing as de la Cova's buyer "flashed" a payment of $1.5 million, Salazar led de la Cova to an apartment in a building that was under surveillance by the DEA. The defendant Shanks-Carrera was observed going inside the building with a duffel bag. When Salazar and de la Cova arrived, Salazar entered the building to make sure that the cocaine was there, while de la Cova waited in the car. When he came out five minutes later, Salazar was arrested. Agents then entered the building and arrested Shanks-Carrera, who was hiding in the apartment closet. Agents recovered the duffel bag, which contained ten kilograms of cocaine—the agreed-upon first installment. Chavez-Tesina and Vallejo were both arrested later that day in Queens, New York.

Several days later Gomez attempted to contact Salazar but instead reached de la Cova, who was carrying Salazar's beeper after Salazar's arrest. Gomez was arrested after discussing with de la Cova the March 17th transaction between Gomez, Vallejo, and Salazar—and verifying that that transaction involved cocaine—as well as

discussing a proposed transaction which he refused to execute without Salazar's permission.

Eleven people, including Garcia, were charged in a 21-count superseding indictment. Six of the defendants were charged for alleged narcotics activities involving Garcia. The defendants never went to trial, some pled guilty, or were severed, or (in one case) fled. The five appellants were tried on nine counts of the indictment, the broadest of which alleged that Salazar and Chavez-Tesina conducted a narcotics racketeering enterprise in violation of Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(c) (1982) (Count 2). Salazar, Chavez-Tesina, and Shanks-Carrera were charged with conspiracy to possess with intent to distribute and possession with intent to distribute 50 kilograms of cocaine under 21 U.S.C. §§ 841, 846 (1982 & Supp. IV 1986) (Counts 19 and 20). All but one of the remaining counts involving the appellants dealt with the three separate smaller sales of cocaine in violation of 21 U.S.C. §§ 841, 846 (1982 & Supp. IV 1986): (1) conspiracy and substantive counts against Garcia and Salazar arising out of the January 15th sale of two-eighths of a kilogram of cocaine (Counts 11 and 12); (2) a substantive count against Salazar arising out of the February 6th sale of one-eighth of a kilogram of cocaine (Count 13); and (3) conspiracy and substantive counts against Salazar, Gomez, and Vallejo arising out of the March 17th sale of two kilograms of cocaine (Counts 15 and 16). Finally, Chavez-Tesina was charged with interstate travel in aid of racketeering under 18 U.S.C. § 1952 (1982 & Supp. IV 1986) (Count 14). Each of the offenses alleged in the non-RICO counts was also charged as a predicate act in the RICO count against Salazar and Chavez-Tesina. Thus, the RICO count incorporated the remaining counts against all of the appellants.

Appellants moved unsuccessfully for severance pursuant to Fed.R.Crim.P. 8(b), 12(b), and 14. After jury selection—presided over by a magistrate—trial commenced on February 17, 1987 and concluded with the appellants convicted as follows: Salazar for narcotics racketeering, distribution of cocaine, possession of cocaine with intent to distribute, and conspiracy to distribute cocaine; Chavez-Tesina for narcotics racketeering, illegal interstate travel, posession of cocaine with intent to distribute, and conspiracy to distribute cocaine; Vallejo and Gomez for conspiracy to possess cocaine with intent to distribute and possession with intent to distribute; and Shanks-Carrera for possession of cocaine with intent to distribute. Shanks-Carrear was acquitted on the conspiracy charge. This appeal followed. We affirm.

DISCUSSION

Appellants collectively and individually raise the myriad of issues common in appeals from multiple defendant trials. Although each will be addressed in turn, the principal issue presented is whether a magistrate—rather than a district court judge—may preside during jury selection.

I *Jury Selection by a Magistrate*

Judge McLaughlin assigned the task of jury selection to a magistrate pursuant to local rules for the Eastern District of New York. E.D.N.Y. Magistrates R. 1 ("Full-time magistrates shall have jurisdiction to discharge the duties set forth in 28 U.S.C. Sec. 636."). Salazar, Chavez-Tesina, and Gomez objected to the delegation at the beginning of *voir dire* and Salazar renewed his objection after the jury had been selected. The district judge upheld the delegation, but offered objectants *de novo* review of any challenges to jurors for cause which were not sustained by the magistrate. Because the only juror so challenged had been excused by consent,

appellants declined the offer. There is no claim of prejudice from the delegation of the *voir dire* to the magistrate. Rather, appellants argue that allowing a magistrate to preside at the jury selection in a felony case without a defendant's consent contravenes either the Federal Magistrates Act or Article III of the United States Constitution.

A. Statutory Provisions

In 1968 Congress established the office of United States magistrate, which replaced the office of United States commissioner. Federal Magistrates Act, Pub.L. No. 90-578, 82 Stat. 1107, *reprinted in* 1968 U.S. Code Cong. & Admin. News 1280 (codified as amended at 28 U.S.C. §§ 631-639 (1982 & Supp. III 1985)). Controversy soon developed regarding the scope of a magistrate's duties. *See, e.g., Wingo v. Wedding*, 418 U.S. 461, 94 S.Ct. 2842, 41 L.Ed.2d 879 (1974) (magistrates not authorized under the Act to conduct habeas corpus evidentiary hearings). As a result, Congress amended the Federal Magistrates Act in 1976 "to clarify and further define the additional duties which may be assigned to a United States Magistrate in the discretion of a judge of the district court." H.R.Rep. No. 1609, 94th Cong., 2d Sess. 2, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6162, 6162 [hereinafter 1976 House Report].

As amended, 28 U.S.C. § 636(b)(1)(A)[1] provides that a magistrate may hear and determine pretrial matters—

[1] Section 636(b)(1)(A) provides:

> (A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

28 U.S.C. § 636(b)(1)(A) (1982).

with certain enumerated exceptions—subject to reconsideration by a district judge when it is argued that the magistrate's order is clearly erroneous or contrary to law. Under § 636(b)(1)(B),[2] a magistrate may conduct hearings on specified motions and file proposed findings and recommendations with a district judge. These findings and recommendations are subject to *de novo* determination by a district judge. Finally, § 636(b)(3) provides that "[a] magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States."

Because no contemporaneous objection had been made to the process in *United States v. DeFiore*, 720 F.2d 757, 765 (2d Cir.1983), *cert. denied*, 466 U.S. 906, 104 S.Ct. 1684, 80 L.Ed.2d 158 (1984), we left open the question of whether 28 U.S.C. § 636 permits a district judge to delegate to a magistrate the power to preside over jury

[2] Section 636(b)(1)(B) provides:

> (B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for postrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

28 U.S.C. § 636(b)(1)(B) (1982). Section 636(b)(1) further provides that

> [a] judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate.

Id. § 636(b)(1).

selection in felony cases. *Haith v. United States*, 342 F.2d 158, 159 (3d Cir.1965) (per curiam) (failure to object to or claim prejudice from delegation waives right to contest delegation), *aff'g* 231 F.Supp. 495 (E.D.Pa. 1964). Here, contemporaneous objections were made and thus the issue is squarely before us.

Our sister circuits are divided on the proper scope of § 636. The Ninth Circuit has held that a magistrate may—consistent with both § 636 and the Constitution—preside over jury selection despite the defendant's objection so long as *de novo* review is available in the district court. *See United States v. Peacock*, 761 F.2d 1313, 1318 (9th Cir.), *cert. denied*, 474 U.S. 847, 106 S.Ct. 139, 88 L.Ed.2d 114 (1985); *United States v. Bezold*, 760 F.2d 999, 1002 (9th Cir.1985), *cert. denied*, 474 U.S. 1063, 106 S.Ct. 811, 88 L.Ed.2d 786 (1986); *see also United States v. Rivera-Sola*, 713 F.2d 866, 874 (1st Cir.1983) (approving of delegation in dictum). Recently, the Fifth Circuit sitting *en banc* determined that it was not Congress' purpose to permit such a delegation under § 636 and that therefore a magistrate may not preside in jury selection over defendant's protests. *See United States v. Ford*, 824 F.2d 1430, 1438 (5th Cir.1987), *cert. denied*, —— U.S. ——, 108 S.Ct. 741, 98 L.Ed.2d 776 (1988).

The first issue to be resolved is what was the aim of Congress when it enacted § 636. Discussing the "additional duties" provision of § 636(b)(3), Congress stated that

> [t]his subsection enables the district courts to continue innovative experimentations in the use of [magistrates]. At the same time, placing this authorization in an entirely separate subsection emphasizes that *it is not restricted in any way by any other specific grant of authority to magistrates.*
>
> Under this subsection, the district courts would remain free to experiment in the assignment of other duties to magistrates which may not necessarily be included in the broad category of "pretrial matters".

1976 House Report, *supra*, at 12, *reprinted in* 1976 U.S. Code Cong. & Admin. News at 6172 (emphasis added); *see also* S.Rep. No. 625, 94th Cong., 2d Sess. 10 (1976) (same statement).

Appellants contend that delegation of jury selection to a magistrate is precluded by a close textual analysis of § 636. They first argue that Congress' purpose was to permit only pretrial matters to fall within § 636(b) and that jury selection, as an integral part of a trial, is not a pretrial matter. In support of their argument, appellants note the reference to "pretrial matters" in the House Report quoted above. But the language of that Report plainly states that the subsection grants to district courts the freedom to experiment *beyond* duties traditionally categorized as "pretrial." Hence, even assuming *arguendo* that jury selection falls on the "trial" side of the line between "trial" and "pretrial"—a line that is, at best, often blurred—the legislative history of § 636(b) does not preclude delegation of that task to a magistrate.

Appellants next direct attention to provisions of § 636 that allow magistrates to conduct misdemeanor trials, 28 U.S.C. § 636(a)(3) (1982), and jury or nonjury civil trials, *id.* § 636(c) (1982 & Supp. III 1985), conditioned in each case upon the consent of the parties. As a matter of consistent statutory interpretation, they argue, it cannot have been Congress' objective to allow magistrate selection of juries in felony cases *without* consent of the parties. Yet conditioning the holding of an entire trial before a magistrate on consent is not conclusive in the context of the separate and distinct function of jury selection. Moreover, the legislative history states in so many words that Congress considered the "additional duties" provision to be broad in scope and unrestricted

by "any other specific grant of authority to magistrates." Hence, we reject appellants' textual arguments.

We conclude that jury selection delegation to a magistrate is within the scope of § 636(b)(3) and consistent with the Federal Magistrates Act. We are mindful of the familiar canon of construction that requires statutes to be construed so as to avoid constitutional questions. *E.g., Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 106 S.Ct. 3245, 3252, 92 L.Ed.2d 675 (1986). Nonetheless, "this canon of construction does not give a court the prerogative to ignore the legislative will in order to avoid constitutional adjudication." *Id.* Here, the legislative will is evident. As the Seventh Circuit stated. "The only limitations on section 636(b)(3) are that the duties be consistent with the Constitution and federal laws and that they not be specifically excluded by section 636(b)(1)." *In re Establishment Inspection of Gilbert & Bennett Mfg. Co.*, 589 F.2d 1335, 1340-41 (7th Cir.), *cert. denied*, 444 U.S. 884, 100 S.Ct. 174, 62 L.Ed.2d 113 (1979); *see also Ford*, 824 F.2d at 1441-42 (Rubin, J., dissenting) (only limit on § 636(b)(3) is Constitution or conflicting law).

B. Constitutional Concerns

The remaining question is whether Article III of the United States Constitution precludes a magistrate from presiding over jury selection in a felony case without the defendant's consent. Article III, § 1 of the Constitution provides that the "judicial Power of the United States, shall be vested in one supreme court and in such inferior Courts as the Congress may from time to time ordain and establish." Moreover, it provides salary protection and tenure for judges appointed to federal courts in order to ensure that the judicial branch retains its independence from the two other branches of government. There are two aspects to the separation of powers doctrine—a cornerstone of our federal constitutional

structure—that are implicated on this appeal. The first addresses the structural relationship between the three branches of government and the second examines the rights secured to individuals by an independent judiciary. *See Schor*, 106 S.Ct. at 3256; *Pacemaker Diagnostic Clinic, Inc. v. Instromedix, Inc.*, 725 F.2d 537, 541 (9th Cir.) (en banc) (noting dual components of separation of powers cases), *cert. denied*, 469 U.S. 824, 105 S.Ct. 100, 83 L.Ed.2d 45 (1984).

1. *Relationships Between the Three Branches*

The first, structural component examines the separate and independent relationship between the judiciary and the other two branches of government. *Schor*, 106 S.Ct. at 3256. Although separation of powers refers to the division of the federal government into three separate branches, the branches are not unconnected from each other. James Madison argued that "unless these departments be . . . blended as to give to each a constitutional control over the others, the degree of separation . . . essential to a free government, can never . . . be duly maintained." *The Federalist* No. 48, at 308 (J. Madison) (New American Library ed. 1961).

The concept of "blended" branches has been best capsulized by Justice Jackson, who observed how the Constitution diffused power between the three branches to secure liberty, but at the same time contemplated the integration of the three branches so as to have a workable government: "It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635, 72 S.Ct. 863, 870, 96 L.Ed. 1153 (1952) (Jackson, J., concurring). Each branch does not exist in its own separate, airtight compartment. In determining whether an act of Congress violates the integrity of one branch the question focuses on "the extent to which" the statute prevents that branch "from accomplishing its constitu-

tionally assigned functions." *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 443, 97 S.Ct. 2777, 2790, 58 L.Ed.2d 867 (1977). Such an approach implements separation of powers concerns and also the theory of checks and balances—an integral component of the constitutional structure—which serves to prevent each branch from encroaching on the power of the other. *The Federalist*, *supra*, No. 51, at 321-22 (J. Madison).

With this background, we turn first to Congress' purpose. Congress aimed through the Federal Magistrates Act to make federal courts more efficient by the expanded use of magistrates. *See* H.R. Rep. No. 1629, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Admin. News 4252, 4257; *Federal Magistrates Act: Hearings before Subcomm. No. 4 of the House Comm. on the Judiciary*, 90th Cong., 2d Sess. 81 (1968) (testimony of Sen. Tydings) ("We hope and think that innovative, imaginative judges who want to clean up their caseload backlog will utilize the U.S. magistrates in these areas and perhaps even come up with new areas to increase the efficiency of their courts."). Although laudable, efficiency does not resolve separation of powers concerns, for " 'the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government. . . .' " *Bowsher v. Synar*, 478 U.S. 714, 106 S.Ct. 3181, 3193-94, 92 L.Ed.2d 583 (1986) (quoting *INS v. Chadha*, 462 U.S. 919, 944, 103 S.Ct. 2764, 2780, 77 L.Ed.2d 317 (1983)).

In the instant case, appellants argue that jury selection is an "inherently judicial" task that cannot be delegated to a non-Article III judge. "[G]uided by the principle that 'practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III,' " *Schor*, 106 S.Ct. at 3256

(quoting *Thomas v. Union Carbide Agricultural Prods. Co.*, 473 U.S. 568, 105 S.Ct. 3325, 3336, 37 L.Ed.2d 409 (1985)), we examine the effect of such a delegation. The Federal Magistrates Act simply enables a district judge to appoint an additional set of eyes and ears to aid in jury selection. At the same time, magistrates are completely subject to Article III judges because the district judges appoint, 28 U.S.C. § 631(a), remove, *id.* § 631(b), and decide what matters are assigned magistrates, *id.* § 636(b)(4). Significantly, a trial court is not required to appoint a magistrate to preside over jury selection. Rather, the deision is left entirely to the Article III court's discretion. In sum, the delegation of authority here occurs entirely *within* the judicial branch, a circumstance which alleviates greatly the underlying structural separation of powers concern with one branch's *encroaching upon* the power of another. *Cf. United States v. Raddatz*, 447 U.S. 667, 682-83, 100 S.Ct. 2406, 2415-16, 65 L.Ed.2d 424 (1980) (distinguishing administrative agencies from officers of the court).

Even assuming the delegated task itself might be labelled "inherently judicial," Article III concerns are not necessarily implicated when the task is not delegated conclusively to a non-Article III tribunal. *See Raddatz*, 447 U.S. at 681-84, 100 S.Ct. at 2415-17 (upholding suppression hearing referred to magistrate with review); *Mathews v. Weber*, 423 U.S. 261, 271-72, 96 S.Ct. 549, 554-55, 46 L.Ed.2d 483 (1976) (upholding social security benefit cases referred to magistrate with reviews); *see also Ford*, 824 F.2d at 1444-45 (Rubin, J., dissenting) (rejecting "inherently judicial" argument); *United States v. Saunders*, 641 F.2d 659, 663 (9th Cir. 1980), *cert. denied*, 452 U.S. 918, 101 S.Ct. 3055, 69 L.Ed.2d 422 (1981) (same). So long as the " 'essential attributes' of judicial power are retained in the Art. III Court," *see Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 81, 102 S.Ct. 2858, 2876, 73

L.Ed.2d 598 (1982) (plurality opinion of Brennan, J.), the delegation of power in a statute does not contravene Article III.

The availability of *de novo* review in this case vested the ultimate decision regarding the composition of the jury with the trial court. Thus, the trial court retained the inherently judicial power to make the final decision. Significantly, retention by an Article III court of this power has been considered crucial in Article III cases. In *Raddatz*, for example, the Supreme Court held that referral of a suppression motion to a magistrate under § 636(b)(1) did not violate Article III or the defendant's due process rights. 447 U.S. at 680-81, 684, 100 S.Ct. at 2414-15, 2416. Distinguishing the question of whether final decisionmaking power on a suppression motion could be delegated to a non-Article III tribunal, *id.* at 681, 100 S.Ct. at 2415, the Court stated that "delegation does not violate Art. III so long as the ultimate decision is made by the district court," *id.* at 683, 100 S.Ct. at 2416. As Justice Blackmun commented, there is little threat to the independence and authority of the judicial branch "when the district judge—insulated by life tenure and irreducible salary—is waiting in the wings, fully able to correct errors." *Id.* at 686, 100 S.Ct. at 2417 (Blackmun, J., concurring); *see also Northern Pipeline*, 458 U.S. at 81-83 (opinion of Brennan, J.) (discussing *Raddatz*); *Mathews*, 432 U.S. at 271, 96 S.Ct. at 554 (final decision remains with judge); Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 915, 933 (1988) (advocating theory "that sufficiently searching review of a legislative court's or administrative agency's decisions by a constitutional court will always satisfy the requirements of article III").

Similarly, the trial judge here was "waiting in the wings" and offered *de novo* review, which the appellants declined. Nor do appellants claim that *de novo* review would have been ineffective. *Raddatz* compels the conclusion that neither delegation of *voir dire* per se nor delegation under the facts of this case erodes the power and independence of the judiciary. Consequently, we perceive no conflict with the first component of the separation of powers doctrine.

2. *Article III Rights*

The second component of the separation of powers doctrine safeguards the rights of litigants vis-a-vis the judicial branch. Litigants have a "right to have claims decided before judges who are free from potential domination by other branches of government." *Schor*, 106 S.Ct. at 3256 (quoting *United States v. Will*, 449 U.S. 200, 218, 101 S.Ct. 471, 482, 66 L.Ed.2d 392 (1980)). This component most often arises in the context of a litigant's consenting to a non-Article III forum. *E.g.*, *Schor*, 106 S.Ct. at 3256-57; *Pacemaker Diagnostic*, 725 F.2d at 541-42. Here, appellants affirmatively objected to the delegation of *voir dire* to a magistrate, thereby rendering of greater import the second component of the doctrine. In cases where consent is absent the second component requires us to view a delegation of jurisdiction from the perspective of the individuals whose liberty is secured by our tripartite system of government. Although many of the same considerations are necessarily at play in both components of the separation of powers doctrine and although both serve to protect the single overall mission of Article III. *cf. Schor*, 106 S.Ct. at 3266 (Brennan, J., dissenting) ("In my view, the structural and individual interests served by Article III are inseparable."), each emanates from a different perspective.

Applied to the instant case, the second component of the doctrine ensures that whatever right a litigant has to the presence of an Article III judge is effectively safeguarded when jury selection is delegated to a magis-

trate. While not minimizing the importance of jury selection in the context of a trial, we decline to hold that Article III requires the physical presence of an Article III judge at that precise point in the adjudicatory process. Historically a judge was not required to be present during *voir dire* or to hear challenges for cause. *See Ford*, 824 F.2d at 1447 (Rubin, J., dissenting). Appellants argue that an Article III judge is required to be present at trial and refer to cases indicating that trial begins with jury selection. The cases cited focus on a defendant's right to be present at jury selection, *see, e.g., Lewis v. United States*, 146 U.S. 370, 373-74, 18 S.Ct. 130, 137-38, 36 L.Ed. 1011 (1892), or on when a trial begins for purposes of the Speedy Trial Act, *see, e.g., United States v. A-A-A Elec. Co.*, 788 F.2d 242, 246 (4th Cir. 1986), rather than on a right to an Article III judge. Hence, they are inapposite. The point at which trial begins and particular constitutional protections attach can vary with the individual right involved. *Cf. Press-Enterprise Co. v. Superior Court of Calif.*, 464 U.S. 501, 509 n.8, 104 S.Ct. 819, 828 n.8, 78 L.Ed.2d 629 (1984) (double jeopardy). Thus, even if we accept appellants' premise that an Article III judge must preside over a trial, it does not necessarily follow that for purposes of Article III trial begins with jury selection.

The availability of *de novo* review alleviates apprehension that a litigant will be deprived of the tangible benefits ensured by a judicial branch that is separate and independent from the remaining two branches of government. Tacitly acknowledging this point, appellants argue that the lack of an Article III judge's physical presence at *voir dire* is somehow demeaning to potential jurors. We decline to adopt this debatable hypothesis as a justification for a broad constitutional rule.

In sum, we hold that even absent a defendant's consent the Federal Magistrates Act permits district courts

to delegate the task of jury selection in felony cases to a magistrate. Additionally, such a delegation does not contravene Article III of the Constitution where, as here, the district court affords *de novo* review of unsustained challenges to jurors for cause.

II *Single or Multiple Conspiracy*

Salazar argues that the indictment charged him with several conspiracies and that he was prejudiced because the evidence at trial proved only a single conspiracy. The issue of the government's indictment for single versus multiple conspiracies arises frequently in criminal jurisprudence. *See, e.g., Kotteakos v. United States*, 328 U.S. 750, 755, 66 S.Ct. 1239, 1243, 90 L.Ed. 1557 (1946) (convictions reversed because single conspiracy charged, multiple conspiracies proven); *United States v. Nersesian*, 824 F.2d 1294, 1302-03 (2d Cir.) (evidence properly supported single conspiracy charge), *cert. denied*, —— U.S. ——, 108 S.Ct. 357, 98 L.Ed.2d 382 (1987); *United States v. Miley*, 513 F.2d 1191, 1205-07 (2d Cir.), *cert. denied*, 423 U.S. 842, 96 S.Ct. 74, 46 L.Ed.2d 62 (1975); *United States v. Borelli*, 336 F.2d 376, 378 (2d Cir. 1964), *cert. denied*, 379 U.S. 960, 85 S.Ct. 647, 13 L.Ed.2d 555 (1965). Instead of arguing that the government charged a single conspiracy but proved multiple, unrelated conspiracies—a recurring problem on appeal—Salazar contends that the reverse situation fatally impaired his trial.

We disagree. Multiple conspiracies exist "unless the evidence of the scale of the operation permit[s] the inference that the persons at a particular level must have known that others were performing similar roles." *Miley*, 513 F.2d at 1207. The record is devoid of evidence indicating this quantum of knowledge among appellants while involved in the acts that led to their convictions. In fact, were this a case where the government had charged a single conspiracy, we would be hard

pressed to find evidence supporting a jury determination that a single conspiracy actually did exist. *Cf. Nersesian*, 824 F.2d at 1302 (analyzing evidence in conspiracy case). Having previously admonished the government that it must "cease combining in an alleged single conspiracy, criminal acts loosely, if at all, connected." *United States v. Bertolotti*, 529 F.2d 149, 151 (2d Cir. 1975), we should not treat the fact that it heeded such advice in this case with stonefaced indifference. Here, the trial court's failure to charge the jury on single versus multiple conspiracies was not error and Salazar's contrary contention is unpersuasive. This does not mean, of course, that the government may arbitrarily jointly try defendants alleged to have engaged in unrelated conspiracies, for the rules government joinder and severance still apply.

III *Joinder and Severance*

Salazar, Shanks-Carrera, Vallejo, and Gomez object to the trial court's denial of their motions for severance. It should be noted initially that all of the counts in the indictment concerning the non-RICO appellants were charged also in the RICO count as predicate racketeering acts against Salazar and Chavez-Tesina. Joinder of these defendants in the same indictment was therefore proper under Fed. R. Crim. P. 8(b), even though multiple conspiracies were charged and even though some defendants were not named in all the conspiracy counts, which also constituted RICO predicate offenses, or in the overarching RICO count. *See United States v. Barton*, 647 F.2d 224, 230-40 (2d Cir.), *cert. denied*, 454 U.S. 857, 102 S.Ct. 307, 70 L.Ed.2d 152 (1981); *United States v. Weisman*, 624 F.2d 1118, 1129 (2d Cir.), *cert. denied*, 449 U.S. 871, 101 S.Ct. 209, 66 L.Ed.2d 91 (1980); *United States v. Gallo*, 668 F. Supp. 736, 748 (E.D.N.Y. 1987), *mandamus granted on other grounds*, 844 F.2d 283 (2d Cir. 1987); *United States v. Castellano*, 610 F. Supp. 1359, 1396-97 (S.D.N.Y. 1985). The only question is whether denial of the Fed. R. Crim. P.

14 motions for severance from the joint trial was a clear abuse of the trial court's discretion. *Nersesian*, 824 F.2d at 1303.

A. Salazar

The essence of Salazar's argument for severance encompasses the issues of proper joinder under Rule 8(b) and of single versus multiple conspiracies. These arguments were rejected above and need not be discussed further. Salazar also contends that he was prejudiced by the admission of conspiracy evidence that related to parties charged in the indictment, but who were not tried. This is not a *severance* argument--as appellant contends --but rather a *relevance* argument. The trial court admitted the evidence on the ground that it was relevant to show the breadth of the "enterprise" that formed the basis for the RICO count and to show Salazar's knowledge and intent, which he had put in issue. The weighing of relevance against prejudice to see where the balance tips is entrusted to the discretion of the trial court. Salazar does not argue that the trial court acted arbitrarily or irrationally. *See United States v. Esdaille*, 769 F.2d 104, 108 (2d Cir.), *cert. denied*, 474 U.S. 923, 106 S.Ct. 258, 88 L.Ed.2d 264 (1985). Hence, the denial of the severance motion must stand.

B. Shanks-Carrera

Shanks-Carrera urges that the denial of a severance in his case created unfair prejudice, correctly claiming that he was the least implicated in the broad series of transactions that form the nexus of this prosecution. Different degrees of guilt or notoriety among defendants obviously do not mandate separate trials. *Nersesian*, 824 F.2d at 1304. Further, that Shanks-Carrera was acquitted on the conspiracy count is a strong indication that the jury was capable of separately evaluating each defendant's culpability and that there was no prejudicial "spillover" of evidence. *See, e.g., Weisman*, 624 F.2d at 1130.

In addition, the relatively small number of defendants, the straightforward nature of the proof, the similarity of the charged offenses, and the short trial all support the trial court's determination that the jury was able fairly to weigh the evidence against each defendant. Nor can it be said that the trial court's denial of Shanks-Carrera's motion for severance resulted in "a miscarriage of justice." *United States v. Bari*, 750 F.2d 1169, 1177 (2d Cir. 1984), *cert. denied*, 472 U.S. 1019, 105 S.Ct. 3482, 87 L.Ed.2d 617 (1985). We therefore affirm the denial of Shanks-Carrera's motion for severance.

C. Vallejo and Gomez

For the reasons discussed above concerning Shanks-Carrera's motion for severance, we also affirm the denial of Vallejo's and Gomez's motions for severance.

IV *Evidentiary Issues*

A. Rule 105 Limiting Instructions

Vallejo and Gomez assert that the failure to grant a severance coupled with the trial court's limiting instructions unduly impaired their trial. The trial court denied Vallejo's and Gomez's requests that limiting instructions be given contemporaneously with the admission of each piece of physical evidence, delimiting which defendant(s) the evidence was admissible against. Judge McLaughlin did give contemporaneous limiting instructions when co-conspirator statements were admissible against some—but not all—defendants. In addition, the trial court gave a general instruction to the jury in his charge:

> Some of the charges in this case have been made against some of the defendants and not against others. You must decide what the evidence shows about each defendant without considering any evidence that may have been received solely against some other defendant or defendants.

> Each defendant is entitled to have the case against that defendant decided solely on the evidence and the law that applies to him.

Appellants argue that Fed. R. Evid. 105, which provides that "when" evidence is admissible against one party but not another, the court "shall" instruct the jury as to the limited admissibility, requires that instructions accompany every exhibit at the time admitted. Although there is some support for the proposition that Rule 105 mandates a contemporaneous limiting instruction when any type of evidence is admitted for a limited purpose, *see* 21 C. Wright & K. Graham, *Federal Practice and Procedure* § 5065 (1977 & Supp. 1987), the weight of authority is to the contrary. *See United States v. Carson*, 702 F.2d 351, 367 (2d Cir.) (trial court instructed jury on numerous occasions to accord each defendant separate consideration; no mention of contemporaneous instruction), *cert. denied*, 462 U.S. 1108, 103 S.Ct. 2457, 77 L.Ed.2d 1335 (1983); *United States v. Losada*, 674 F.2d 167, 171-72 (2d Cir.) (instructions in charge alone adequately protected against prejudice), *cert. denied*, 457 U.S. 1125, 102 S.Ct. 2945, 73 L.Ed.2d 1341 (1982); *see also* 1 J. Weinstein, *Weinstein's Evidence* ¶ 105[05], at 105-44 (1986) ("The jury may be instructed either as the [limited] evidence is admitted *or as part of the general charge*.") (emphasis added; footnote omitted).

The timing of Rule 105 limiting instructions with regard to physical evidence is best left to the trial court's discretion. *See United States v. Oxford*, 735 F.2d 276, 280 (7th Cir. 1984); *United States v. Dobish*, 708 F.2d 240, 243 (6th Cir. 1983). Accordingly, the record must be examined to ascertain whether Vallejo and Gomez suffered any harm from the trial court's refusal to give contemporaneous limiting instructions when admitting each piece of physical evidence that was not relevant to them. *See Losada*, 674 F.2d at 171-72 (looking for prejudice); *Weisman*, 624 F.2d at 1130 (same); *United*

States v. Toliver, 541 F.2d 958, 963 (2d Cir. 1976) (same).

We conclude that Judge McLaughlin's limiting instruction in his general charge, together with his contemporaneous limiting instructions upon the admission of coconspirator statements, adequately protected appellants. Where, as here, there are a limited number of defendants, the jury is able more easily to separate the evidence admitted against each of them. *See United States v. Teitler*, 802 F.2d 606, 617 (2d Cir. 1986). Further, the evidence admitted without contemporaneous instructions was physical evidence that lent itself to compartmentalized consideration. *See, e.g., Toliver*, 541 F.2d at 963 (documents). As a consequence, the refusal of the court to give contemporaneous limiting instructions at each introduction of evidence with limited admissibility did not unfairly prejudice Vallejo and Gomez.

B. DEA Expert Testimony

Appellants object to the admission of a DEA expert's testimony concerning the meaning of certain recorded coded telephone conversations between them. Such testimony is subject to challenge only when the expert interprets and draws conclusions from the evidence instead of simply testifying as to the jargon of the drug trade. *See Nersesian*, 824 F.2d at 1308; *United States v. Brown*, 776 F.2d 397, 400-01 (2d Cir. 1985), *cert. denied*, 475 U.S. 1141, 106 S.Ct. 1793, 90 L.Ed.2d 339 (1986); *United States v. Young*, 745 F.2d 733, 760-61 (2d Cir. 1984), *cert. denied*, 470 U.S. 1084, 105 S.Ct. 1842, 85 L.Ed.2d 142 (1985). Appellants do not allege that the agent's testimony included his interpretations or conclusions. This claim is therefore also without merit.

C. Sufficiency of the Evidence

Chavez-Tesina, Vallejo, and Shanks-Carrera contend that there is insufficient evidence to support their convictions. It is a familiar litany that the standard for appellate review of an insufficiency claim places a "very heavy burden" on the appellant. *Losada*, 674 F.2d at 173. Our inquiry is whether the jury, drawing reasonable inferences from the evidence, may fairly and logically have concluded that the defendant was guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 317, 99 S.Ct. 2781, 2788, 61 L.Ed.2d 560 (1979); *United States v. Barnes*, 604 F.2d 121, 157 (2d Cir. 1979), *cert. denied*, 446 U.S. 907, 100 S.Ct. 1833, 64 L.Ed.2d 260 (1980). In making this determination, the evidence must be viewed in the light most favorable to the government. *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942), and all permissible inferences construed in its favor. *United States v. Dazzo*, 672 F.2d 288 (2d Cir.), *cert. denied*, 459 U.S. 836, 103 S.Ct. 81, 74 L.Ed.2d 77 (1982). In addition, the "[e]xistence of and participation in a conspiracy with the requisite criminal intent may be established . . . through circumstantial evidence." *United States v. Sanzo*, 673 F.2d 64, 69 (2d Cir.), *cert. denied*, 459 U.S. 858, 103 S.Ct. 128, 74 L.Ed.2d 111 (1982). We examine in turn the evidence against each appellant.

1. *Chavez-Tesina*

Chavez-Tesina's convictions arose primarily out of his involvement in the 50 kilogram transaction. Salazar described his "partner" to be de la Cova as a Colombian of Japanese descent who had lived in London. Chavez-Tesina matched the physical description and possessed a British driver's license and Colombian passport when he was arrested. When Salazar told de la Cova that his partner was travelling in New Orleans, independent evidence established that Chavez-Tesina was in fact then in New Orleans.

More important, there was testimony to the effect that Chavez-Tesina was in New Orleans looking for cocaine

that would be acceptable in the New York market. As the transaction approached accomplishment, Salazar made telephone calls to Chavez-Tesina's home, confirmed by a pen register. The subject of these calls was the cocaine transaction. In one call, Salazar referred to the other party as "Diego," Chavez-Tesina's first name. The jury was entitled to believe that this evidence linked Chavez-Tesina to Salazar, the RICO enterprise, and the 50 kilogram deal.

2. *Vallejo*

Vallejo, a less active participant in the affairs providing the basis for the charges, was convicted of conspiracy to possess cocaine and possession with intent to distribute arising out of the March 17, 1986 two kilogram cocaine sale to de la Cova. Vallejo argues that there was no proof that he was involved in the conspiracy. The evidence, he argues, shows at best mere association with a drug dealer.

Agent de la Cova heard Salazar tell Vallejo on March 15th that he had something "very, very good." From this the jury could reasonably conclude that Salazar referred to cocaine and that Vallejo comprehended this meaning. Just two days later, in Vallejo's presence, Gomez delivered two "favors" to Salazar. It is beyond dispute that Gomez delivered cocaine because Gomez said shortly before he was arrested that the "favors" were kilograms of cocaine. This cocaine subsequently was transported to Vallejo's house.

Further support for the inference that Vallejo was involved in a narcotics conspiracy and distributed cocaine is the fact that he delivered a small amount of cocaine to Salazar on March 21st—only moments after Salazar called and asked for some. When he was arrested, Vallejo had a beeper, $2000 in cash, a small amount of drugs and drug paraphernalia, again evi-

dencing that his business relationship with Salazar related to the narcotics trade. *See Carson*, 702 F.2d at 368. This proof, as well as the reasonable inferences arising from it, supports the jury's finding that Vallejo was a knowing participant in the conspiracy.

3. *Shanks-Carrera*

Shanks-Carrera was alleged to be a supporting player in the 50-kilogram transaction. It was he whom the DEA observed carrying a duffel bag—later found to be filled with cocaine—into the apartment arranged as the delivery site. Shanks-Carrera was acquitted of conspiracy, but convicted of possession.

Testifying at trial, he claimed that he had no knowledge that the duffel bag contained cocaine. Appellant explained that incriminating statements made at the time of his arrest—and hiding when DEA agents arrived—were the results of fear and a desire to protect his brother, who allegedly gave him the duffel bag. The jury was in a better position to asess these issues of credibility. Viewing the evidence in the light most favorable to the government, we find it sufficient to establish that the appellant possessed cocaine with the intent to distribute it.

CONCLUSION

Accordingly, for the reasons discussed above, the judgments of conviction are affirmed.

OAKES, Circuit Judge (dissenting):

I respectfully dissent.

I agree with the majority of the judges in the Fifth Circuit sitting en banc that, at the very least, the practice of permitting magistrates to conduct jury voir dire in felony cases raises serious constitutional questions. *See United States v. Ford*, 824 F.2d 1430 (5th Cir.1987) (en banc), *cert. denied*, —— U.S. —— 108 S.Ct. 741, 98 L.Ed.2d 776 (1988). Selection of a petit jury to try a felony case has both particular and systemic importance; it implicates not only the defendant's Fifth and Sixth Amendment rights and provides the foundation upon which the remainder of the trial is built, but is essential, as Judge Patrick Higginbotham reminded us, "because the impartiality of the adjudicator goes to the very integrity of the legal system." *Id.* at 1435 (quoting *Gray v. Mississippi*, —— U.S. ——, 107 S.Ct. 2045, 2056, 95 L.Ed.2d 622 (1987)). The process of voir dire is especially significant; not only is the peremptory challenge a necessary part of trial by jury, *Swain v. Alabama*, 380 U.S. 202, 219, 85 S.Ct. 824, 835, 13 L.Ed.2d 759 (1965), but the prosecutor's use of peremptory challenges may violate other constitutional requirements. For example, a prosecutor's challenges based on race implicate the Equal Protection clause. *Batson v. Kentucky*, 476 U.S. 79, 88-89, 106 S.Ct. 1712, 1718-19, 90 L.Ed.2d 69 (1986). And, while double jeopardy does not attach until the jury is sworn, *Crist v. Bretz*, 437 U.S. 28, 35, 98 S.Ct. 2156, 2160, 57 L.Ed.2d 24 (1978), the Sixth Amendment rights of a defendant to a speedy and public trial, *accord* Speedy Trial Act, 18 U.S.C. §§ 3161-3174 (1982 & Supp. IV 1986), to be present while a jury is selected, *Lewis v. United States*, 146 U.S. 370, 376, 13 S.Ct. 136, 138, 36 L.Ed.2d 1011 (1892); *United States v. Crutcher*, 405 F.2d 239, 242-43 (2d Cir. 1968), *cert. denied*, 394 U.S. 908, 89 S.Ct. 1018, 22 L.Ed.2d 219 (1969); Fed.R.Crim. P. 43(a), and to the assistance of counsel during jury

selection, *see Brewer v. Williams*, 430 U.S. 387, 399, 97 S.Ct. 1232, 1239, 51 L.Ed.2d 424 (1977), all attach before or at the time jury selection begins. Since the whole purpose of voir dire is to obtain an impartial jury, one that is "capable and willing to decide the case solely on the evidence before it," *Smith v. Phillips*, 455 U.S. 209, 217, 102 S.Ct. 940, 946, 71 L.E.2d 78 (1982), it follows that the right to such a jury attaches from the beginning of the selection process.

Are these constitutional concerns met by the district judge's power to conduct a de novo review of the voir dire process, here specifically reserved but not utilized? Does that power satisfy the constitutional concerns above noted? The answer, I feel, is at best maybe. The district court's review of a magistrate's rulings on challenges would surely be difficult, as Judge Higginbotham pointed out in *United States v. Ford*, 824 F.2d at 1436-37, and would undoubtedly lead to appeals on the issue to circuit courts. Perhaps the district court has the inherent power simply to conduct a voir dire a second time. *See United States v. Raddatz*, 447 U.S. 667, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980). But this approach presents serious practical problems; for example, the second interrogation of a potential juror would be likely to put that individual on the defensive, making a reenactment of the original voir dire impossible. *See United States v. Ford*, 824 F.2d at 1437; *but see id.* at 1446 (Rubin, J., dissenting). In any event, no clear-cut answer can be forthcoming unless and until the Supreme Court decides the constitutional question.

The practice of delegating jury selection to a magistrate, absent the consent of the defendant and the Government, is to my mind a bad one. Intending no offense toward magistrates, delegation demeans the process, making it appear essentially clerical in nature. At the very least it impedes the judge from personally instilling in the jury at the start of the trial a sense of the impor-

tance of the work the jury is about to perform. It is apt to make the jury less attentive to the judge during the trial, and the judge less sensitive to the problems of the individual jurors, as well as to the overall chemistry of the jury itself. For due process also demands, as well as a disinterested jury, "a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Smith v. Phillips*, 455 U.S. at 217, 102 S.Ct. at 946. Events can occur during the magistrate's voir dire that would require the judge's review, but he would be disadvantaged because they occurred outside his presence. In addition, a defendant might feel short-changed, and left with the impression that he, and his case, are of lesser consequence because the judge himself did not participate. The Constitution instructs us that every criminal defendant, regardless of his status in the community or the nature of the crimes with which he is charged, is important and entitled not only to the best practicable process but also entitled reasonably to feel as if he has received the fairest practicable process.

I cannot think that the practice—at least in a jurisdiction such as the Eastern District of New York where the judge, rather than the attorneys, conducts the voir dire—is one that can save much judicial time. It is a practice that is not followed in the Southern District of New York, and in the districts in which it is used it is exercised without established rules for determining when voir dire should be assigned and without established procedures for review. I would, in the exercise of our supervisory power, prohibit it except, possibly, when the parties consent, and then only pursuant to rules controlling the district court's review. By so doing, I would incidentally avoid the problems of statutory and constitutional interpretation that my colleagues solve with a sweep that leaves me, as I suggest, unconvinced. I therefore dissent.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 4th day of August one thousand nine hundred and eighty-eight

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Docket Nos. 87-1243, 87-1244, 87-1245, 87-1246, 87-1264

UNITED STATES OF AMERICA,
Appellee,

v.

JOSE DANERY GARCIA, DAMARIS SANCHEZ, WILLIAM SALAZAR, FABIO PORRAS, DIEGO CHAVEZ-TESINA, ADELA GOMEZ, BEIMAR VALLEJO, JOSE GOMEZ, JAIME NEWBOLD, YOLANDA MARTINEZ, HUGO SHANKS-CARRERA,
Defendants,

DIEGO CHAVEZ-TESINA, BEIMAR VALLEJO, JOSE GOMEZ, HUGO SHANKS-CARRERA, WILLIAM SALAZAR,
Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Appellants WILLIAM SALAZAR, HUGO SCHANKS-CARRERA, and JOSE GOMEZ.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED. Judge Oakes dissenting.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
ELAINE B. GOLDSMITH
Clerk

SUPREME COURT OF THE UNITED STATES

No. 88-5014

JOSE GOMEZ,
Petitioner

v.

UNITED STATES

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. This case is consolidated with 88-5158, *Diego Chavez-Tesina v. United States* and a total of one hour is allotted for oral argument.

January 9, 1989

SUPREME COURT OF THE UNITED STATES

No. 88-5158

DIEGO CHAVEZ-TESINA,
Petitioner

v.

UNITED STATES

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. This case is consolidated with 88-5014, *Jose Gomez v. United States* and a total of one hour is allotted for oral argument.

January 9, 1989